

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND ALLEN MCCULLER,

Defendant-Appellant.

Supreme Court No. 128161

Court of Appeals No. 250000

Oakland Circuit Court

No. 02-183044-FH

128161
Suppl

**SUPPLEMENTAL BRIEF OF ATTORNEY GENERAL AND PROSECUTING
ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL**

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Counter-Statement of Basis of Jurisdiction of the Court of Appeals

The People accept defendant's statement of appellate jurisdiction as accurate and complete.

Counter-Statement of Question Involved

- I. Under *Blakely v Washington*, the "statutory maximum" for purposes of the Sixth Amendment right to trial by jury is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. An intermediate-sanction cell authorizes the trial court to sentence a defendant to many other sentence alternatives that may keep the defendant incarcerated well beyond the 12-month jail maximum should the defendant violate the terms of the intermediate-sanction. Where an intermediate-sanction cell is not the functional equivalent of the statutory maximum, does a departure from an intermediate-sanction cell for substantial and compelling reasons implicate the decision in *Blakely v Washington*?

Amicus answers: That issue is not presented in this case, but otherwise, "NO"

Counter-Statement of Facts

Amicus joins in the counterstatement of facts of the appellee, the People of the State of Michigan.

Argument

- I. Under *Blakely v Washington*, the "statutory maximum" for purposes of the Sixth Amendment right to trial by jury is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. An intermediate-sanction cell authorizes the trial court to sentence a defendant to many other sentence alternatives that may keep the defendant incarcerated well beyond the 12-month jail maximum should the defendant violate the terms of the intermediate-sanction. Because the intermediate-sanction is not the functional equivalent of the statutory maximum, a departure for substantial and compelling reasons from an intermediate-sanction sentence does not implicate the decision in *Blakely v Washington*.

A. This case does not implicate the intermediate-sanction cell question.

This Court has issued an order in this case directing that the parties are to "file supplemental briefs within 28 days of the date of this order addressing the effect, if any, of *Blakely v Washington*¹ on the prison sentence imposed in this case," and invited briefs amicus curiae from the Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan "on the intermediate sanction cell issue. . . ." Because defendant in this case received a sentence of 2-to-15 years imprisonment that was *within* the guidelines as scored by the trial judge, rather than a departure by the trial judge from the guidelines, this Court must address whether the intermediate-sanction cell issue is implicated by this appeal.

The Michigan Legislature enacted mandatory sentencing guidelines applied to offenses committed on or after January 1, 1999. These guidelines cover all felony offenses and all misdemeanor offenses punishable by one year or more of incarceration, except for offenses for which there is no judicial discretion in determining the sentence. After the trial court scores the defendant's prior record variables (PRV) and the offense variables (OV), the defendant's sentencing guidelines range is calculated by finding the intersection of the PRV and OV scores on the appropriate sentencing guidelines grid chart, which consists of various "cells." A cell is

¹ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

the "intersection of an offender's OV level and PRV level in a sentencing grid."² The sentencing guidelines range is to be found in the grid's cells where the OV and PRV intersect. A cell consists of one of three possible minimum sentencing guidelines ranges:

1. **Prison Cell:** If the minimum sentence range is more than 12 months, the trial court is required, absent a departure for substantial and compelling reasons, to sentence the defendant to a term of imprisonment in the State prison.
2. **Staddle Cell:** If the upper limit of the guidelines range exceeds eighteen months and the lower limit of the range is twelve months or less, the trial court, may sentence the defendant to imprisonment in the State prison with a minimum term within the range, or to an intermediate sanction that may include a term of imprisonment in the county jail of not more than twelve months.³
3. **Intermediate-sanction Cell:** If the upper limit of the recommended minimum sentence range is eighteen months or less, the court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit a defendant to the Department of Corrections.⁴ Intermediate sanctions include, but are not limited to, one or more of the following possible dispositions⁵:
 - Inpatient or outpatient drug treatment
 - Probation with any probation conditions required or authorized by law
 - Residential probation
 - Probation with jail
 - Probation with special alternative incarceration
 - Mental health treatment
 - Mental health or substance abuse counseling
 - Jail
 - Jail with work or school release
 - Jail with or without authorization for day parole
 - Participation in a community corrections program
 - Community service
 - Payment of a fine
 - House arrest
 - Electronic monitoring

² Michigan Sentencing Guidelines Manual, page 9, Definitions, which can also be found on the internet at: http://courts.michigan.gov/mji/resources/sentencing-guidelines/2005_PDFs/definitions2005.pdf

³ MCL 769.34(4)(c).

⁴ MCL 769.34(4)(a).

⁵ MCL 777.1(d); MCL 769.31(b)

The trial court computed defendant's guidelines at 5-to-28 months, and imposed a sentence of 2-to-15 years. On appeal, defendant raised objection to the scoring of offense variable (OV) 1, OV 2, and OV 3. The Court of Appeals rejected these claims⁶:

- **OV 1:** was scored at ten points because the victim was touched by a weapon other than a knife or stabbing weapon. "At trial, the victim testified that he saw defendant making a downward motion toward his head with a metal pipe or a bat. The victim testified that he was then struck in the head and rendered unconscious. This testimony amply supported the trial court's assessment of ten points for OV 1."
- **OV 2:** was scored at one point because the offender possessed a potentially lethal weapon other than a firearm, incendiary device, knife, or other stabbing weapon. Again, the victim testified that "defendant assaulted him with a metal pipe or bat. A metal pipe or bat used to strike a person in the head is unquestionably a potentially lethal weapon."
- **OV 3:** was scored at twenty-five points because life threatening or permanent incapacitating injury occurred to the victim. The defendant's claim was that these injuries must be established by medical evidence. Nothing in the statute so requires. The victim testified "he suffered a broken nose, broken eye socket and broken cheekbone, and his skull was fractured and his inner ear wall caved in as a result of the beating. The victim also testified that he suffered a concussion and a closed head injury." The defendant described the victim as "half dead" after the assault, and the victim testified his hearing had been worsened as a result of the beating. The Court of Appeals held that this testimony was sufficient alone "to establish the nature and extent of his injuries for the purpose of assessing twenty-five points under OV 3."

Although defendant argues that the scoring was "erroneous," that argument is, for the reasons stated by the Court of Appeals, without merit. Defendant's principal argument is actually that the scoring here was "unconstitutional" because the "jury did not find proof beyond a reasonable doubt of any of the factors underlying Offense Variables 1, 2, and 3." (Application,

⁶ *People v McCuller*, unpublished opinion per curiam of the Court of Appeals, decided January 11, 2005 (Docket no. 250000), slip opinion p 3.

at p 15.) This is simply the *Blakely*⁷ argument before this Court presently in *People v Drohan*⁸— that no guidelines factor used to compute the minimum range can be considered unless determined by a jury. Amicus refers the Court to the amicus brief filed by PAAM in *Drohan*; this argument is incorrect when applied to the minimum term of an indeterminate sentence, for reasons stated in that brief.

In short, the only way the intermediate-sanction cell issue arises in this case is if this Court concludes in *Drohan* that *Blakely* applies to the indeterminate-sentencing scheme in this State. And if that is so, the question here is subsumed by that holding.

The guidelines here were neither erroneously nor unconstitutionally scored. An intermediate-sanction cell issue *could* arise if the guidelines here *had* been misscored, so that a correct scoring placed the guidelines range in the intermediate-sanction cell. The sentence here would thus be a departure, and the question would become whether a departure for substantial and compelling reasons from a sentence falling within the mandatory intermediate-sanction cell violates the principles of *Blakely*.⁹ For purposes of discussion of the issue, amicus will treat the case as though it were properly scored in an intermediate-sanction cell (*e.g.*, 0-to-17 months), and that the trial judge exceeded the guidelines and imposed a prison sentence rather than an intermediate-sanction cell sentence for reasons the judge identified as substantial and compelling.

⁷ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

⁸ *People v Drohan*, Michigan Supreme Court Docket no. 127489, presently being considered by this Court after oral argument on November 8, 2005.

⁹ And even if the guidelines were misscored here, amicus assumes the Court would ordinarily simply remand for resentencing, and await a further appeal depending on whether defendant is aggrieved by the resentencing. If, on a resentencing, the judge were to determine that the guidelines are scored in the intermediate-sanction cell, and then departed from the guidelines by imposing a prison sentence, *then* the *Blakely* issue would be presented.

B. *Blakely* does not apply to Michigan's intermediate-sanction cell.

Summary of Analysis

A sentence to prison on substantial and compelling reasons where the guidelines fall within the intermediate-sanction cell range does not violate *Apprendi*¹⁰ and *Blakely*. Judicial fact-finding in Michigan can incorporate facts not necessarily admitted by a defendant or found by a jury, because the purpose of calculating the sentencing guidelines is to determine what defendant's *minimum* sentence should be under the guidelines. Until the trial court actually rules on the parties' objections to the scoring of the guidelines at the time of sentencing, a defendant in Michigan has no reasonable expectation of what his actual sentencing guidelines range will be when he is convicted following a guilty plea or trial.

Even if a defendant did reasonably expect to fall within an intermediate-sanction cell, there is no reasonable expectation that defendant would receive a straight jail sentence until the court actually chooses to impose it at the sentencing hearing. The sentencing guidelines statute, however, only requires the sentencing judge to impose an intermediate-sanction but not necessarily a definitive jail term.¹¹ An intermediate-sanction cell authorizes the trial court to sentence a defendant to many other sentence alternatives that have the potential to keep the defendant incarcerated well beyond the 12-month jail ceiling if the defendant violates the terms of the intermediate-sanction. This distinguishes the situation in the State of Washington in which defendant *Blakely* had a reasonable expectation that he could not be incarcerated longer than 53 months when he pleaded guilty, regardless of his subsequent conduct in prison. In Michigan, by contrast, a sentence to an intermediate-sanction is not equivalent to a statutory maximum because the court's jurisdiction may extend beyond 12 months and authorize the court

¹⁰ *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

¹¹ MCL 769.34(4)(a).

to sentence the defendant to prison in an indeterminate sentence for the same crime depending on defendant's subsequent conduct.

Moreover, a sentence to prison on substantial and compelling reasons where the guidelines score in the intermediate-sanction cell range does not fall within the holding of *Apprendi* and *Blakely*. An intermediate-sanction cell is not the equivalent of the "statutory maximum," but rather is a *decrease* from the normal minimum sentence. An upward departure from an intermediate-sanction cell range is therefore nothing more than an increase of a defendant's minimum sentence, which is constitutionally permissible.

1. **A defendant has no reasonable expectation of receiving an intermediate-sanction sentence where the determination of the appropriate guidelines range is the product of intensive judicial fact-finding on which reasonable minds might differ.**

The factor that distinguishes Michigan's intermediate-sanction cell from being the functional equivalent of the "statutory maximum" determinate sentence range in *Blakely* is that in Michigan, a defendant will not know that he is entitled to be placed into an intermediate-sanction cell when pleading guilty, or when convicted after trial. This lack of notice is rooted in judicial fact-finding that the Legislature entrusted to judges to determine where a defendant's *minimum* sentence falls in the sentencing guidelines grid. A comparison between the Washington sentencing guidelines scheme and Michigan's illustrates this point.

In the State of Washington, the determination of the initial standard guideline range entails much less exercise of judicial discretion than does Michigan's determination of the sentencing guidelines. While the scoring of Michigan's sentencing guidelines offense variables (OV) involves a complex "post-mortem" dissection of the entire criminal episode, Washington's "offense seriousness" level is initially determined solely by the offense of conviction. At the time defendant *Blakely* pleaded guilty, the Washington sentencing guidelines scheme divided felony

offenses into 15 levels of seriousness.¹² Thus, a defendant in Washington could easily determine his crime's seriousness level by merely finding the conviction offense on a list. Next, in Washington, enhancements are added to the standard guideline range for felony traffic offenses, deadly weapons, and drug-related activity committed during an offense. In the case of defendant Blakely, because he specifically pleaded guilty to committing the offense with a firearm, a deadly weapon enhancement added 36 months to his standard range, resulting in a determinate sentencing range of from 49-to-53 months.¹³ There, even though defendant Blakely would reasonably have expected a sentence between 49 and 53 months when he pleaded guilty and the court accepted his plea, the trial court later imposed an "exceptional sentence" after specifically determining that defendant had acted with deliberate cruelty. The constitutional infirmity in *Blakely* was that the trial court tacked on the 30-month exceptional sentence based on facts not admitted by defendant in his guilty plea, and not determined by a jury beyond a reasonable doubt, where the defendant had a reasonable expectation that the 53-months would be his maximum sentence.¹⁴

In Michigan, by contrast, a defendant upon conviction must wade through the various OV's (ranging from such factors as the type of weapon used and its potential lethality, intent involved, psychological and physical injury to the victims, contemporaneous acts, defendant's continuing criminal behavior and defendant's role in the offense) before determining the

¹² RCW 9.94A.320 (now 9.94A.515). Parts of Washington's criminal code were recodified and amended. Amicus in this brief will cite the provisions from Washington that were in effect at the time Blakely was sentenced. See *Blakely*, 542 US at 299 n 1.

¹³ The instructions for deadly weapon enhancement in the Washington sentencing guidelines manual state in pertinent part that "if . . . a jury returns a special verdict that the accused . . . was armed with a deadly weapon at the time of the commission of the crime, the sentence must be increased." State of Washington Adult Sentencing Manual, 1998, p I-18. Defendant Blakely, however, admitted the facts for the deadly weapon enhancement during his guilty plea. *Blakely*, 542 US at 298-299.

¹⁴ *Blakely*, 542 US at 303-304.

appropriate offense severity level. The OV factors are fact-specific and are often the subject of vigorous debate before sentencing. In scoring the guidelines, a sentencing court has discretion to determine the number of points to be scored, provided that evidence of record adequately supports a particular score. "Scoring decisions for which there is any evidence in support will be upheld."¹⁵

But because Michigan has an indeterminate sentencing system, judicial fact-finding necessary to calculate the defendant's sentencing guidelines grid score satisfies the Constitution under *Apprendi* and *Blakely*.¹⁶ The scoring of the variables for the sentencing guidelines is for the purpose of setting the *minimum* sentence.¹⁷ The sentencing guidelines apply to offenses committed on or after January 1, 1999, and the minimum sentence shall be within the appropriate guidelines range unless there is a statutory mandatory minimum sentence that conflicts with the guidelines range, or the range exceeds 2/3rds of the statutory maximum, or the sentencing court chooses to depart from the guidelines range.¹⁸ A "departure" means "a sentence imposed that is not within the appropriate minimum sentence range established under the sentencing guidelines[.]"¹⁹ A departure is limited to no more than 2/3rds of the statutory maximum sentence.²⁰

¹⁵ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹⁶ See Amicus brief of Prosecuting Attorneys Association of Michigan's (PAAM) in *People v Drohan*, Michigan Supreme Court Docket no. 127489, presently being considered by this Court after oral argument on November 8, 2005.

¹⁷ See MCL 769.34(2) ("the minimum sentence imposed by a court of this state for a felony. . . shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed."). The Michigan Sentencing Guidelines Manual defines the term "grid" as providing "a recommended minimum sentence range for combinations of the OV and PRV levels for each crime classification."

¹⁸ MCL 769.34(2) and (3).

¹⁹ MCL 769.31(a).

²⁰ MCL 769.34(2)(b).

A trial court in Michigan is constitutionally permitted to engage in judicial fact-finding to determine the applicable sentencing guidelines range of the *minimum* sentence. Justice Scalia, writing the majority opinion in *Blakely*, observed that judicial fact-finding under an indeterminate sentencing scheme does not impinge on the province of the jury²¹:

[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. **Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence -- and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.** In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [Emphasis added.]

In Michigan, unlike the situation in *Blakely* where a defendant in Washington can easily discern the standard guideline range when he pleads guilty or has been convicted after a trial, the determination of a defendant's guideline range here is the product of intensive judicial fact-finding, where reasonable minds can differ. But this is constitutionally permissible precisely because its aim is to calculate the appropriate range to determine what a defendant's *minimum* sentence should be.

Blakely and *Apprendi* only apply when judicial fact-finding results in an increase in the defendant's statutory *maximum* sentence.²² *Blakely* and *Apprendi* have no application to a

²¹ *Blakely*, 542 US at 308-309.

²² *Apprendi*, 530 US at 476, 490; *Blakely*, 542 US at 301, 303.

determination of a minimum range of an indeterminate sentence or to a departure from the minimum range.²³

A defendant in Michigan, therefore, receives no reasonable notice or expectation of receiving an intermediate-sanction cell range when he commits the offense, pleads guilty, or is convicted after a trial. The scoring of the sentencing guidelines is not complete until judicial fact-finding concludes at the time of sentencing, when objections to the sentencing guidelines scoring are made and adjudicated by the sentencing court. This is unlike the situation in *Blakely* where the defendant Blakely knew that when he pleaded guilty to second-degree kidnapping involving use of a firearm, the maximum determinate sentence he would receive was in the range of 49-to-53 months.

In short, until the sentencing hearing is held, a defendant in Michigan cannot be certain whether his sentencing guideline score will fall within an intermediate, straddle, or prison cell. Because of the discretionary nature of the calculation of the sentencing guidelines to determine a defendant's *minimum* sentence range, and because reasonable minds can differ as to the applicability of the myriad OV and PRV factors, one cannot be certain as to one's guideline score until the trial court has ruled on objections and exceptions from either the defendant, the prosecutor, or both.

- 2. Even where a defendant's sentence falls within an intermediate-sanction cell, this is not the functional equivalent of a statutory maximum because the defendant receives neither a promise nor reasonable expectation of a straight jail term, not to exceed 12 months.**

Even when the sentencing guideline score falls within an intermediate sanction cell, a defendant has no reasonable expectation that he will receive a fixed jail term. Rather,

²³ *Blakely*, 542 US at 308-309.

intermediate sanctions include, but are not limited to, one or more of the following possible dispositions²⁴:

- Inpatient or outpatient drug treatment
- Probation with any probation conditions required or authorized by law
- Residential probation
- Probation with jail
- Probation with special alternative incarceration
- Mental health treatment
- Mental health or substance abuse counseling
- Jail
- Jail with work or school release
- Jail with or without authorization for day parole
- Participation in a community corrections program
- Community service
- Payment of a fine
- House arrest
- Electronic monitoring

Other than a straight jail term—which a defendant does not know he will receive up until the time the judge actually imposes the sentence—an intermediate sanction cell probationary punishment still subjects a defendant to the jurisdiction of the court and parole board beyond the term imposed by the court at sentencing if the defendant fails to honor the terms of his intermediate sanction. If a defendant violates the terms of the intermediate sanction (e.g.,

²⁴ MCL 777.1(d); MCL 769.31(b)

violates the terms of his probation), the trial court can then recalculate the sentencing guidelines to consider the defendant's subsequent conduct during the term of the intermediate sanction.²⁵

"[R]evocation of probation simply clears the way for a resentencing on the original offense."²⁶

Any increase in the defendant's sentencing guidelines score could push the guidelines range into a straddle or prison cell because the guidelines consider all of the defendant's conduct up to the time of sentencing.

The upshot is that defendant could be resentenced to an indeterminate prison sentence within the guidelines, with the parole board retaining jurisdiction up to the statutory maximum, which in the present case is 15 years. The sentencing guidelines intermediate-sanction cell range in this instance is not equivalent to a maximum sentence as it was in *Blakely*; the defendant may still be subject to the statutory maximum for his punishment depending on his conduct while on probation. This is not true in Washington. Defendant *Blakely*'s 53-month prison term could in no way be extended, no matter what his conduct was in prison, and thus he had a reasonable expectation that when he pleaded guilty that the State of Washington could not extend his incarceration beyond 53 months.²⁷

Therefore, unlike the situation in *Blakely*, where defendant had a reasonable expectation upon pleading guilty that he would serve no more than 53 months in prison, no matter what his subsequent conduct in prison, a defendant in Michigan has no reasonable expectation that the

²⁵ *People v Hendrick*, 472 Mich 555, 557, 560; 697 NW2d 511 (2005).

²⁶ *Hendrick*, 472 Mich at 562.

²⁷ The State of Washington has a fixed term, determinate sentencing system, and there is no parole system. Defendant *Blakely* could, for instance, commit any number of crimes during his 53-month incarceration (even murder), and the State of Washington would be without authority to extend his prison term unless it brought new criminal charges and defendant *Blakely* were convicted of those new offenses. Thus, for defendant *Blakely*, a 53-month prison term was effectively the maximum sentence he could have received upon conviction. This would not be true, however, for a defendant who falls within an intermediate-sanction cell in Michigan.

judge will sentence him to a straight jail term within an intermediate sanction cell. Once the defendant knows that his sentencing guidelines score falls in the intermediate-sanction cell range, he receives no promise of any receiving a straight jail sentence. The trial court need only acknowledge to a defendant that his sentencing guidelines score falls within an intermediate-sanction cell range, that the court finds substantial and compelling reasons why an intermediate-sanction punishment is not appropriate, and that a departure sentence is warranted. There is no requirement that the trial court first impose a straight jail sentence before choosing to sentence defendant to a prison sentence. The intermediate-sanction cell is not the equivalent of a statutory maximum as in *Blakely* because the court, in appropriate circumstances, may sentence the defendant for the same crime to an indeterminate sentence where the crime's statutory maximum is also the required maximum sentence.

3. Because an intermediate-sanction cell is essentially a decrease in the minimum sentence, a departure sentence into a straddle or prison cell does not violate the rule in *Apprendi* and *Blakely*.

The trial court's calculation of the sentencing guidelines is a calculation to determine the defendant's minimum sentence. Under Michigan's indeterminate sentencing scheme, the maximum sentence is set by statute—in all cases—as the maximum penalty provided by law.²⁸ MCL 769.8 provides in pertinent part: "The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence." The trial court therefore has absolutely no discretion to determine the length of the maximum sentence. The judge also makes no findings of fact (outside of

²⁸ MCL 769.8

habitual offender sentencing concerning a defendant's prior criminal record—a permissible finding not requiring a jury verdict²⁹) to impose this mandatory maximum sentence in all cases.

An intermediate-sanction cell jail sentence is therefore nothing more than a *decrease* in defendant's minimum sentence, because it eliminates the maximum sentence and relieves the defendant from being subjected to the jurisdiction of the parole board up to the normal statutory maximum.³⁰ In all other sentences in Michigan, a minimum term still subjects the defendant to the jurisdiction of the parole board up to the normal statutory maximum. An intermediate-sanction cell jail sentence therefore is a lesser minimum sentence in kind than other prisoners receive for their minimum terms because there is no longer any continuing oversight of the parole board up to the statutory maximum.

The point is also demonstrated by the fact that intermediate sanctions apply whenever a sentencing guidelines grid is 18 months or less, but a jail sentence is not to exceed 12 months.³¹ Limiting incarceration to 12 months despite a minimum guideline upper limit of 18 months shows Legislative intent to decrease the severity of the minimum sentence. To interpret the intermediate sanction provision as creating a maximum sentence would render meaningless the Legislature's determination that some guideline calculations call for a minimum sentence greater than 12 months, but less than 19 months. The Legislature has made a determination that despite facts warranting a prison term, it has chosen to *decrease* a defendant's minimum sentence to only a jail confinement. An intermediate sanction cell is not, therefore, the equivalent of the "statutory maximum" for *Apprendi* and *Blakely*; it is, rather, a decrease from the minimum. And

²⁹ *Apprendi*, 530 US at 490.

³⁰ An intermediate-sanction cell jail term is also a decrease from the statutory *maximum* sentence because it eliminates the maximum statutory term from the sentence. A decrease from the maximum sentence by definition does not violate rule in *Apprendi* or *Blakely*.

³¹ MCL 769.34(4)(a).

because an intermediate sanction cell is a minimum sentence, a judge can depart from that sentence without violating the holdings in either *Apprendi* or *Blakely*.

Intermediate-sanction cells are designed primarily for the low-level felony offender, and reflect a legislative preference that low-level felony offenders be housed in county jails, apart from the more dangerous offenders in the State prison system. The option of departing from an intermediate cell is a way for the trial court to ensure that the more dangerous offenders can be placed into the State prison system. Intermediate sanctions were never intended to repeal existing sentence ranges or create new sentence maximums. "When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature."³²

³² *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Conclusion and Relief Sought

WHEREFORE, for all the foregoing reasons, Amicus Curiae, in support of Plaintiff-Appellee, respectfully request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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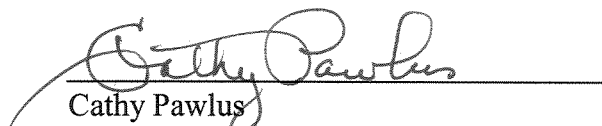
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Proof of Service

The undersigned certifies that on the 13th day of January 2006, she served a copy of Plaintiff-Appellee's Brief on Appeal upon the attorney for the within named defendant by mailing same in an envelope bearing postage fully prepaid, plainly addressed as follows:

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